

No. 386

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JOHN T. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION,

Petitioner,

v.

TEXACO INC. AND PAN AMERICAN PETROLEUM CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM OF CONCURRENCE OF TEXACO INC.

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On August 19, 1963, Petition for Writ of Certiorari was filed seeking review of judgment of the Court of Appeals for the Tenth Circuit, entered May 29, 1963, in *Texaco Inc., et al. v. Federal Power Commission*, 317 F. 2d 796 (Pet. App. 21-41). By its decision, the Tenth Circuit set aside certain orders of petitioner after finding that the acts complained of were undertaken "without statutory authorization."

Texaco would have opposed the issuance of certiorari on the grounds originally advanced by petitioner, urging that the decision below is perfectly consistent with the pertinent decisions of this Court, of which *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, and *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, are but two. Texaco would further urge that Sections 5, 7 and 8 of the Administrative Procedure Act, 5 U.S.C. 1004, 1006 and 1007, are pertinent to the issues involved in these matters, in addition to the statutes and regulations cited by petitioner, and Texaco continues to assert that "Reasons for Granting the Writ," as advanced by petitioner (Pet., pp. 10-19) are not such as to warrant the relief sought.

However, on August 26, 1963, the Court of Appeals for the Ninth Circuit entered its decision in *The Superior Oil Company v. Federal Power Commission*, ... F. 2d ..., No. 18252. The Ninth Circuit has stated:

"We are mindful of the fact that the Tenth Circuit has held Order No. 242 void and without effect. *Pan American Petroleum Corp. v. Federal Power Commission*, 10 Cir., 317 F. 2d 796, decided May 20, 1963. ... we respectfully decline to follow the *Pan American* decision." (mimeo, p. 23, footnote omitted.)

Thus, while Texaco directly disputes that the reasons originally advanced by petitioner are proper grounds for issuance of a writ of certiorari, Texaco does recognize that this stated conflict between the decision of the Tenth Circuit in the instant matter and the decision of another circuit on the same question of federal law is proper and sufficient grounds for issuance of a writ of certiorari. Texaco concurs

that under this Court's Rule 19, a writ of certiorari should be issued.

Respectfully submitted,

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